Supreme Court of the United States.

DECEMBER TERM, 1870.

BOUDINOT ET AL., Plaintiffs in Error,
vs.
THE UNITED STATES.
No. 253.

BRIEF FOR PLAINTIFFS.

This is an information for a forfeiture of two hundred and seven half-pound papers of tobacco, &c., for violation of internal revenue laws, found in the Cherokee country, belonging to native Indians, who in good faith were carrying on the manufacture in that country, for the purpose of selling the product to their countrymen and the freedmen there.

Decree of forfeiture in the court below.

Two questions arise:

First. How far the immunities from internal taxation secured by the tenth article of the treaty of 1866 to the Cherokee nation, on its manufactured products within that nation, may be abrogated or invalidated by an act of Congress?

Second. What should be the provision of an act to interfere with such immunities, and whether the provisions of section 107 of the act passed July 20, 1868, rightly construed, do extend the internal revenue laws therein mentioned to the Cherokee nation in the case at bar?

To rightly appreciate the first question, it is necessary to determine what is the exact force of the treaties made between the United States and the Cherokee nation.

The first treaty was made before the adoption of the Constitution of the United States, in 1785, and was a treaty of peace, providing for the restoration of prisoners of war and the property taken by the Cherokees, and reciprocally upon the part of the United States; the Cherokees acknowledging the protection of the United States establishing a boundary of their lands within the limits of the United States, and providing that the United States should have the exclusive right of regulating trade with the Indians. We may pass over all intervening treaties until the treaty of 1833, which expressly annuls the sixth article of the treaty of 1828, "and the United States agree to cancel the same," in which it is provided "that the United States agree, when the Cherokees desire it, to give the Cherokees a plain set of laws suited to their condition."

In the 14th article of the treaty of 1835, the United States covenant and agree that the lands ceded to the Cherokee nation [for their home beyond the Mississippi] "in no future time shall, without their consent, be included within the territorial limits or jurisdiction of any State or Territory"; that they shall secure the Cherokee nation, by their national councils, "the right to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their own people, or such persons as have connected themselves with them, *provided always, that they shall not be inconsistent with the Constitution and laws of the United States*, as have been or may be passed, regulating trade and intercourse with the Indians."

It will be observed that article first of the Constitution, section eight, in the third clause, empowered Congress "to regulate trade with foreign nations and among the several States and with Indian tribes," and that is the only mention of Indians in the Constitution, except describing these persons as Indians not taxed. All treaties with the Indians up to the adoption of the Constitution contained articles conceding to the United States the right "to

regulate trade and intercourse with the Indian tribes." These provisions were undoubtedly the origin of this addendum to the clause of the eighth article, and it is noticeable that Indian tribes are classed in that article with foreign nations.

In 1861, the Cherokee nation made a treaty with the Confederate States, which was repudiated by the national council in 1863—a portion of the Indians having taken that side in the contest, and the necessities of the United States having withdrawn from them the protection of our troops.

On the 27th day of August, 1866, a treaty was finally ratified, with its amendments, with the advice and consent of the Senate, between the United States and the Cherokee *Nation*, (*sic.*,) reciting that "the existing treaties are deemed insufficient, and that the contracting parties agree as follows." This treaty was made necessary by the war, in which the Cherokee nation had taken part as allies with the Confederacy; and although the war with the Confederacy was terminated by Executive proclamation, the United States, by its Executive and Senate, terminated the war with the Cherokee nation, as allies of the Confederacy, by a formal treaty, the first article of which declared the pretended treaty with the Confederacy void; the second declared full amnesty for everything that took place in the war, with the surrender of all property of the Confederacy, all warlike stores, to the United States, a repeal of the confiscation laws of war, and the restoration of all rights of property. By the ninth article the Cherokee nation covenant and agree "that never hereafter shall slavery or involuntary servitude exist in their nation otherwise than as a punishment for crime, whereof the parties shall have been duly convicted, and that the owners of slaves so emancipated shall never receive compensation therefor." The tenth article provides that "every Cherokee and freed person, resident in the Cherokee nation, shall have the right to sell any products of his farm, including his or her live stock, or any merchandise or manufactured products,

and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory."

The 11th article grants rights of way through the domain of the Cherokee nation to any corporation authorized by Congress. The 12th article provides qualified legislative powers in the Cherokee national councils, but prohibits the councils from enacting laws "inconsistent with the Constitution of the United States or laws of Congress, *or existing treaty stipulations of the United States.*"

The 31st article, which is the only other one which seems to bear upon the present inquiry, provides that "all provisions of treaties heretofore ratified and in force, and not inconsistent with the provisions of this treaty, are hereby reaffirmed and declared to be in full force; and nothing herein shall be construed as an acknowledgment by the United States or as a relinquishment by the Cherokee nation of any claims or demands under the guarantees of former treaties, except as herein expressly provided."

I have called the attention of the court to the several provisions of these treaties in order of their date, so that the exact condition of the treaty obligations of the United States with the Cherokee nation may be felt. I beg leave to suggest:

First. That in all these treaties the United States have dealt with the Cherokee nation as an independent power, of limited sovereignty, under the protectorate of the United States.

Second. That all interference with the Cherokee nation by the United States Government in changing their legal relations have been subordinated to the provisions of such treaties and to acts of legislation carrying into effect those provisions.

Third. That the United States have never claimed to exercise general jurisdiction independent of treaty provisions over the Cherokee nation, but have always legislated

in subordination to those provisions. This will very clearly appear from the provisions of the treaty of 1866.

Although the XIIIth amendment had been adopted as part of the Constitution of the United States in the year 1865, abolishing slavery everywhere within the jurisdiction of the United States, and had operated everywhere "within the exterior limits of the United States," *ex proprio vigore*, for a year, yet the Government expressly negotiated and treated with the Cherokee nation for the abolition of slavery in that nation in August, 1866.

Again: although appreciating the desirability of a railway through the Cherokee country, yet all acts of Congress granting railway facilities have stopped at the border of the Indian territory; and in the treaty of 1866 negotiations were had and provisions made for rights of way over Indian lands, the Government thus relinquishing its right of eminent domain over that country in that behalf, a right which it has not failed to assert in like cases in the States.

In view of the practice of the Government, as sustained by the decisions of the courts, in removing these Indians from the home of their fathers across the Mississippi; in view of the practice of the Government, sustained by the decisions of the courts, that hostilities with Indian tribes are not war, requiring a declaration under the Constiution; it may be too late—although much may be well said with great force and pertinency on the affirmative of the question—to maintain that the treaty with the Cherokee nation has the same force and effect as one with a foreign nation, and perhaps to the decision of the case the distinction is an immaterial one. The treaty obligations between the Government and the Cherokee nation have the force of domestic compacts of the highest type and most stringent force and effect, especially upon the powerful nation who, in the position of Protectors and Guardian of the Indian tribes, makes the contract with its wards.

It is further submitted that the stipulations and provisions of the Indian treaties, if they have not the force and effect of those of foreign nations, and therefore an infrac-

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It is further submitted that the stipulations and provisions of the Indian treaties, if they have not the force and effect of those of foreign nations, and therefore an infrac-

tion of their provisions, does not draw after it the consequences of war, yet, that they have the same and equal effect with domestic municipal laws enacted by Congress; or, in other words, that the govermental act, through the Executive and Senate, in the form of a treaty, sanctioned by the practice and traditions of the Government from the earliest time, has the same force and effect as a binding rule of action or law, as well upon the Government as the citizen, as another govermental act known as the act of Congress at least; with the superadded force to the former that it is in addition a solemn contract or compact, founded upon a consideration and guarded with all the muniments of the highest faith.

Having thus established—if I am right—the legal status of the provisions of law under which the plaintiffs in error claim to act, let us inquire how far an act of Congress may interfere with such provisions of law, and in what manner the law-making power must express itself, before the courts will construe its enactments into such interference.

We stand at least upon provisions having not only the force of law, but having the higher and stronger significance of a solemn contract guaranteed by the faith of the Government, plighted in the most binding form known either to the Constitution or the public law of nations.

The Constitution of the United States expressly inhibits the States from passing any law impairing the obligations of contracts, and, as we have seen, the treaties with the Cherokee nation as expressly inhibit them from passing any law impairing the contracts expressed in their treaty stipulations. Now, did the United States reserve to itself the right to pass laws to impair the obligations of such contracts? Is it to be said that while the Constitution inhibits the States from passing laws to impair the obligations of any contract, because to do so is so repugnant to the sense of equity and justice of mankind that it cannot be permitted, that the United States did reserve to its own legislature only (the Congress) the right to do so great a wrong, so abhorrent to the sense of justice of mankind?

Further, while, by its solemn treaty, it required its quasi subjects and wards to inhibit themselves from passing any law to violate treaty stipulations made with their Protector and Superior and quasi Guardian, can it be the protector and guardian reserved to itself a power to legislate to impair its own treaty stipulations made, *uno flatu*, with such inhibition?

Judge Chase, himself a signer of the Declaration of Independence, in Culver *vs.* Bull, (3 Dallas, 390,) says: "There are acts which a federal or State legislature cannot do without exceeding their authority." * * * "An act of the legislature contrary to the great first principles of our social conflict cannot be considered a rightful exercise of legislative authority." * * * "A law that destroys or impairs lawful private contracts of citizens is * * * against all reason and justice for a people to intrust a legislature with such powers; therefore it cannot be presumed they have done it." "A legislature * * * cannot violate the right of an antecedent lawful contract." A FORTIORI can a legislature not violate an antecedent solemn contract of the Government itself, made upon due and sufficient consideration of its highest authority.

It may be answered, an individual may violate his contract and take the consequences; cannot the supreme Government do the same? But the statement of the objection is its own best answer: If the individual violates his contract to take the consequences, it presupposes that he has the power and not the right so to do, and that there is some higher authority to which the injured party may appeal, which will punish the wrong-doer for the wrong done in violation of his contract. But in the case of the State there is no such higher authority to which the injured party can appeal for redress; and, therefore, *quo ad hoc*, the State has not the power to violate its plighted faith; for, in theory of public law and public right, the State has neither power nor right to do a wrong which cannot be redressed. True, the State may abrogate all its treaty obligations with a foreign nation, if the emergency

of the occasion requires it. But, in that case, the question of right and the redress of the wrong in so doing must be submitted to an arbiter for decision, to wit, the arbitrament of arms, for such abrogation is an act of war. But when the Government exercises this power toward the Cherokee nation under its protection, its ward cannot appeal to that arbitrament for the wrong done, because it cannot declare war, and has no redress left save rebellion, which is not a remedy.

We submit, therefore, that the inhibition upon the Government to exercise either the right or the power to abrogate its treaty with the Cherokee nation is stronger and more effectual in a forum where justice and equity are administered in the spirit of laws, than in the case of an equally but not more solemn treaty and compact with a foreign nation. In the latter case the United States may take the consequences of so doing, but in this there are none to take, and therefore the more flagrant the wrong.

Without pressing these considerations further—the exact affirmance of which after all may not be necessary to the decision of the cause—I think I may claim that nothing but the most plain, unequivocal, and distinct enunciation of the law of the legislature, fully expressed, will be considered by the court as abrogating or infringing the provisions of such a compact as we find these treaty obligations to be.

The tenth article of the treaty of 1866 provides that "Every Cherokee * * * shall have the right to sell any products of his farm, * * * or any merchandise or manufactured products, and to ship and drive the same to market without restraint, paying any tax thereon which is now or may be levied by the United States on the quantity sold outside of the Indian territory."

I will not stop to discuss the construction of these provisions on the question, whether by their force, any restraint can be put upon the sale or manufacture of products within the Indian territory, for the very fact that it provides or a tax on the quantity sold outside of the Indian terri-

tory determines the construction, upon the principle *inclusio unius exclusio alterius.*

Let me call attention, however, to the condition of the tax law at the time this article was agreed upon between the two contracting parties. From 1862, amended in 1864, and afterwards amended on the 13th of July, 1866, a system of internal revenue taxation over every State and Territory of the United States had been enacted by Congress. Collection districts had been made by the President, under the provisions of the act of 1862, in every State and organized territory of the United States except the Indian territory, which, by express stipulation of the treaty, could not "be made, without their consent, a part of any State or Territory of the United States"; and taxes were being levied in all those collection districts. Therefore it became necessary, in order to exclude the conclusion, as was done by article ten, that when the Indian products should be shipped or driven into any territory where the internal revenue laws had operation, to provide a tax should then be levied thereon; clearly assuming, as well as expressly providing, that until the manufactured products were shipped outside of the Indian territory, no restraint in the shape of taxation—the highest class of restraint—should be placed upon them.

Therefore we are pressing no new *casus omissus*, no unprovided-for contingency of the law upon the court, but a condition of things expresely foreseen, negotiated upon, treated of, and considered in the very settlement of the article of a treaty which became under the Constitution a part of the supreme law of the land. It will be useful to observe here that no attempt has ever been made by the revenue officers, during the four years of the existence of the excise tax, to assess, levy, or collect the same upon any Indian product, manufactured or otherwise, although the internal revenue law was general, and extended itself wherever the jurisdiction of the Constitution of the United States in that behalf extended.

In 1868, on the 20th of July, Congress considered and

passed an act imposing a tax on distilled spirits and tobacco and for other purposes, the one hundred and seventh section of which is, that the revenue laws imposing taxes on distilled spirits, fermented liquors, snuff, and cigars, shall be held and considered to extend to such articles produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not. (15 Statutes, 157.)

It is claimed that this provision levied excise taxes upon these specific articles, the products of the Indian country, while they remained therein, the property of and for the use of the Indians. It will be remarked that it was not claimed in the court below, or at bar, by the United States, that the other internal revenue laws ever had been so extended over the Indian country. But if they were not, why not? These laws of the United States were operative everywhere where the United States had jurisdiction. And if that jurisdiction for this purpose was complete over the Indian country, *non obstante* the treaties, then all the tax laws became operative in those Indian countries, and all those Indians were thereby taken out of the category of Indians not taxed, because upon that theory all Indians were by law taxed.

But, I repeat, this effect of the revenue laws has not been, and is not, claimed; and for what reason? Because the internal-revenue tax laws had never been extended over the Indian territory by name or designation; and therefore, by a rule of construction which I believe to be, and submit has been, uniform from the foundation of the Government, no law is held to extend to the Indian country, under the peculiar relations of subject nations to this, without the Indian territory has been expressly named or described in the enacting clause. In the argument in the court below, and in the brief of the argument at bar, there is no suggestion whatever of a different rule of construction.

Here, then, our case stands upon impregnable ground. There is not the slightest indication of any intention in

the act of 1868 to extend its provisions over the Indian country by name or designation. The rule of construction which we claim is no novelty. It was brought here from the English common law, by which no act of Parliament affected the Isle of Jersey, to use the most analogous case, without that island was expressly named. So here the absolute vacuity of construction of any legislation being extended to the Indian country without being expressly named, from the foundation of the Government, it is submitted, is conclusive upon the court. And especially will the court be drawn to this rule of construction when the Government will be preserved from so manifest a breach of good faith as would be without notice the enactment of this law in the face of the most solemn obligations.

But it may be objected to this view of the case, What then does this section 107 apply to, if not to the Indian territory? In 1862 all the territory of the United States had been divided into collection districts, except where force by the rebellion prevented; and unless Congress intended this provision to operate upon the Indian country, what else was there upon which it could be operative? A recurrence to the history of this legislation easily answers that question, and shows the necessity for the injection of this new provision into the internal revenue laws. It will be remembered that this law was approved July 20, 1868. We were just then in the position of having acquired the vast extent of territory known as Alaska; the money therefor even had not been paid up to that date, nothing but mere possession had been taken by the United States, and on the 28th day of the same July Congress extended all revenue custom-house laws over that territory, as by this section they extended the excise laws which they were enacting over the same territory by the general words of of section 107, which, the court will find upon examination, were put on as an amendment to the bill during its passage through the Senate. So section 107 had its office without

breaking down or abrogating the plighted faith of the nation in order to give it one.

It is respectfully submitted, that there is still another view of the construction of this section 107, which will give it a purpose not only not in contravention of the treaty rights of the Cherokee nation, but actually in aid and affirmance of such rights.

It will be observed, that its provisions "shall be held and construed to extend to such articles [the articles enumerated] produced anywhere within the exterior boundaries of the United States, whether the same shall be within a collection district or not." The provisions do not touch any specific territory by their terms. It will be remembered that the treaty stipulations, made subsequent to any prior amendment of the internal revenue laws, save this section, subjected the products of the Indian country, which were not within any collection district, to a tax to be levied thereon when sold outside of the Indian country. But there was no tax law extending itself over such articles. All the tax laws up to the time of the 107th section, and all the provisions of that act until the injection of that section therein, provided for the collection of the tax on such manufactured products only where they were manufactured, not for levying a tax upon them after they left the place of manufacture; and, therefore, it had become necessary to provide for the levy of taxes upon these products of the Indian country, which could not be collected by any law at the place of their manufacture.

This construction of the section, which gives it a prominent and proper place, sustains with it the good faith of the Government in the affirmance of the treaty, is one which the court will favor in order to save the nation from apparent breach of faith, and especially in view of the series of decisions so familiar to the court, and so lately reaffirmed in 5 Wallace, that all provisions of law and treaties in regard to the Indians shall be construed most favorably to that people.

There is another consideration, to which I beg leave to

advert, which may decide the case at bar in favor of the plaintiffs in error, without deciding the great principles generally applicable to the Indian country which we have been discussing. It was decided in the case referred to, on the brief of the United States, Taylor *vs.* Morton, (2 Curtis C. C. Reports, 454,) that treaty provisions even of a foreign nation may be repealed by an act of Congress, so far as those provisions are in the nature of a municipal law. It was also decided that such act of Congress repealing a treaty with a foreign nation was a political question, and not a judicial one, and the judiciary must follow the act of Congress, without inquiring into its effect upon the treaty stipulations.

But I distinguish the case at bar from Taylor *vs.* Morton in this, if in no other, that here the United States, through its own court, is endeavoring to set up its act against its own contract, and against the other party to the treaty, not one of its own citizens; a distinction which I pray the court to take with it in any force or effect that they may give to that case in the argument in favor of the United States.

But let us assume Taylor *vs.* Morton to be good law, although I may be permitted to say, I trust, without offense, that the converse will at least bear argument. Be it so. Then the municipal law, having equal force with the treaty, the converse must be true, that the treaty, being a part of the supreme law of the land, must have equal force with the municipal law. The anterior, then, must always be repealed by a subsequent, when inconsistent.

Now, then, if the court will examine the libel of information, it will perceive that the statutes of 1864 and 1866 are set out therein, and invoked as the provisions of law which have been infringed by the plaintiffs in error on which to found this forfeiture; and that the last provisions of those laws were passed on the 13th of July, 1866, and the treaty stipulations on which we rely was ratified August 27, 1866. So that, although section 107 of the act of July 20, 1868, may be held to extend certain

revenue laws over the Indian territory, yet the treaty stipulations—laws of equal force, being laws made subsequently—have repealed, under the decision of Taylor *vs.* Morton. those revenue laws, so far as they are a restraint upon the sale of manufactured products of the Indian country.

I have refrained from making further observations upon this case, because the elaborate briefs of my associates seem to have exhausted every other consideration thereto applicable. Respectfully submitted,

BENJ. F. BUTLER,
Of Counsel.